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IN THE

Supreme Court of the United States

October Term, 1970

No.

EMMETT THOMAS, NICHOLAS J. HAYDOCK AND JOHN D. JILLSON, TRUSTEES OF THE ANTHRACITE HEALTH AND WELFARE FUND, *Petitioners*

and

CHARLES NEDD, DOMINIC IERO, MAX DYNOSKI AND ANTHONY GANLY, MEMBERS OF THE PENSIONED ANTHRACITE COAL MINERS PROTEST EXECUTIVE COMMITTEE, SUING ON BEHALF OF THEMSELVES AND ALL OTHER MEMBERS OF THE CLASS OF PENSIONED ANTHRACITE COAL MINERS AND WIDOWS OF DECEASED PENSIONED ANTHRACITE COAL MINERS, Intervening Plaintiffs, *Respondents*

v.

HONEYBROOK MINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Emmett Thomas, Nicholas J. Haydock and John D. Jillson, Trustees of the Anthracite Health and Welfare Fund, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, and its amended judgment and opinion on petition for rehearing, entered in this proceeding on May 28 and August 5, 1970, respectively.

OPINIONS BELOW

The opinion of the Court of Appeals and its opinion on petition for rehearing are reported at 428 F.2d 981 and 988. The opinion of the District Court has not been reported. These opinions are appended hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1970. A timely petition for rehearing *en banc* was denied and an amended judgment was entered on August 5, 1970. On October 26, 1970, this Court issued an order extending the time for filing a petition for writ of certiorari to and including November 13, 1970. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is a beneficiary of a welfare Fund subject to the provisions of Section 302 of the Labor-Management Relations Act of 1947 entitled to counsel fees from the recovery in an action brought by the Trustees of the Fund against an employer for a debt due the Fund under the collective bargaining agreement in the following circumstances:

(a) Since 1965, the beneficiary has taken the position that the Fund was and is in violation of Section 302, alleging that two of the three Trustees were Union officers, that the Union has dominated the Fund since its inception, and that the Trustees have been collecting payments from employers in violation of the Act;

(b) The beneficiary joins in the allegedly illegal actions of the Fund by intervening in the Fund's lawsuits against employers to collect payments due the Fund;

(c) The beneficiary, although alleging that the Fund is dominated and controlled by the Union, continues to accept his pension payments, but fails to use the sole and exclusive civil remedy, provided by Section 302(e), to bring the Fund into compliance with the Act?

2. Is a beneficiary of a welfare Fund subject to the provisions of Section 302 of the Act who allegedly induces the Trustees to sue an employer for a debt due the Fund entitled to counsel fees from the recovery because he has helped create a fund?

STATUTORY PROVISION INVOLVED

Section 302 of the Labor-Management Relations Act of 1947, 29 U.S.C. §186, is appended hereto.

STATEMENT OF THE CASE

This action was commenced in May, 1964, by the Trustees of the Anthracite Health and Welfare Fund to collect payments due under the Anthracite Wage Agreement of February 1, 1959, between defendant Honeybrook Mines, Inc., and the United Mine Workers of America, which required defendant to pay to the Fund the sum of seventy cents per ton on each ton of anthracite produced for use or for sale. The Complaint based jurisdiction on Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185.

In September 1965, more than fifteen months after the suit was filed, Charles Nedd, Dominic Iero and others (hereinafter referred to as "the intervenors"), claiming to represent beneficiaries of the Fund, moved to intervene "in order to join in prosecuting plaintiffs' cause of action stated in plaintiffs' complaint against the defendant." (A. 15a) The motion alleged that the Trustees' representation of the beneficiaries in the present suit was inadequate. The District Court granted the motion to intervene without deciding whether or not the Trustees' representation of the beneficiaries was adequate (A. 67a).

After entry, by stipulation and without trial, of a final, nonappealable judgment against defendant in the amount of $963,254.71, the intervenors moved for an award of counsel fees from the recovery.[1]

An affidavit of counsel for the intervenors, filed in support of their motion, recited the formation of a committee

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[1] The motion was filed in ten cases brought by the Trustees against employers, but only the motion in the case against Honeybrook Mines was before the Court of Appeals. The parties stipulated that the decision of the legal questions in this case would be applicable to the other nine cases. The Court of Appeals erred in stating that fee applications were made and denied in thirty-five cases in addition to this one (p. 35).

No appearance was entered for Honeybrook Mines in the Court of Appeals and its counsel did not appear at argument there or in the District Court.

of beneficiaries in 1961, various activities and demands by them, and the institution of suits by them against the United Mine Workers because of its alleged failure to collect royalties due the Fund from employers. The affidavit alleged that "the Trustees' serious prosecution of the above mentioned suits [the Trustees' actions against the employers] is attributable to the Committee's efforts" (A. 94a).

Two suits had been instituted by the Nedd group against the United Mine Workers. Each charged the Union with failing to collect royalties due to the Fund from the employers. The first one was filed in March, 1963, in the Eastern District of Pennsylvania, Civil Action No. 33032, and based jurisdiction upon diversity of citizenship. The District Court dismissed the case for lack of jurisdiction, 225 F. Supp. 750 (E.D. Pa. 1963), and the Court of Appeals affirmed *per curiam*, *Nedd v. United Mine Workers*, 332 F.2d 373 (3d Cir. 1964).

In January, 1965, the Nedd group filed a second action in the Middle District of Pennsylvania, Civil Action No. 8796, basing jurisdiction on Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185. The District Court denied defendant's motion to dismiss for lack of jurisdiction but certified the question for an interlocutory appeal pursuant to 28 U.S.C. §1292(b). The Court of Appeals granted leave to appeal and thereafter reversed, holding that there was no jurisdiction under Section 301 but remanding with leave to plaintiffs to file an amended complaint on a different jurisdictional basis, *Nedd v. United Mine Workers*, 400 F.2d 103 (3d Cir. 1968).

In January, 1969, the Nedd group filed an amended complaint in Civil Action No. 8796, asserting a claim for damages against both the Union and the Trustees of the Fund for breach of their fiduciary duties to the Fund and its beneficiaries. This was the first time that the Nedd group had sued the Trustees. By order of the District Court, extensive discovery is being conducted and defendants' motions to dismiss will not be heard until completion thereof.

The intervenors' position has been and is that they

were responsible for obtaining the recovery in this action and in the other suits brought by the Trustees against the employers because those suits would not have been commenced by the Trustees if the intervenors had not instituted the above actions against the United Mine Workers.

The District Court denied the motion for counsel fees. It made no finding of fact as to whether the intervenors' activities and their suits against the Union caused the Trustees to institute these actions, but held that such a finding, even if made, would be insufficient as a matter of law to warrant a fee:

> "The issue is . . . whether the intervenors were responsible for the creation of the Fund recoveries. (p. 26)

> "The Court must concern itself with the events and circumstances leading up to the commencement of the numerous actions against the delinquent operators, for there is no evidence or argument made that once the suits were instituted, they were not pursued diligently and forcefully by plaintiffs. Indeed, the Court has participated in the avalanche of motions, discovery procedures, pre-trial conferences, trials and settlements and has observed no indication of delay or dereliction in plaintiffs' prosecution of these cases. However, intervenors contend that it was the filing of their two suits against the Union and '. . . the efforts, persistence and ability of Intervenors' counsel . . . which brought about the institution of the actions against the delinquents and thus the creation of the subject fund.' Plaintiffs challenge this contention and assert that the timing of their actions was based solely upon their own judgment and the advice of their counsel in the early part of 1962 that, prior to the institution of legal actions against delinquent operators, an effort should be made to amend the

Labor Contract to remove the possibility of an adverse ruling by the Court that the welfare provisions did not comply with Section 302(c)(5) of the Labor Management Relations Act of 1947. According to plaintiffs, they accepted their counsel's recommendation and devoted their efforts to collecting delinquencies by negotiations with the delinquent operators and it was not until the Spring of 1964, when they were assured by the Union that an effort would be made during the pending negotiations to amend the welfare provisions of the Agreement, that the first action against Honeybrook Mines, Inc. was instituted.

"Applying the test that such allowances are appropriate only in exceptional cases where a plaintiff has created a common fund for the benefit of others, as well as himself, and where it would be unjust to allow others to obtain full benefit of plaintiff's efforts without charging the common fund for attorney's fees, I conclude that intervenors' motion must be denied. The so-called fund realized herein was the result of the efforts of Trustees and their counsel who filed, pursued and, at least in the cases where funds were produced, successfully recovered the damages sought. If there was negligence or breach of a fiduciary duty in not bringing some lawsuits sooner and as a result certain losses to the fund occurred, then this will have to be determined in the case brought against the Mine Workers Union and the Trustees. It may well be that the lawsuits against the delinquent operators would not have been started had not the pensioned miners group brought their actions against the United Mine Workers in the Eastern District and Middle District Federal Courts, but it would be pure guesswork for me to so conclude on the basis of the evidence before me. Even if I were to so conclude, however, this would still fall far short of the findings necessary to support a conclusion that the amounts recovered by the Trustees were created by the efforts of intervenors'

counsel. Their efforts may have been meaningful and commendable, but they did not rise to the level, in the suits before me, to justify an award of counsel fees to them out of the amounts recovered by the Trustees." (p. 29-30)

The Court of Appeals reversed, with Judge McLaughlin dissenting. It held that the facts alleged by the intervenors were sufficient as a matter of law to justify a fee. It also held (even though no evidentiary hearing had been conducted) that the facts alleged by them were true, that their activities caused the Trustees to commence the suits against the employers, and entered an order requiring the District Court to award counsel fees in an appropriate amount:

> "The district court concludes that even if the delinquency lawsuits would not have been started had not the pensioned miners' group started their actions, the Fund still could not be charged with committee counsel fees when the trustees were the actual plaintiffs. This is a far too narrow view of the applicable rule. *Trustees v. Greenough*, 105 U.S. 527 (1881) is the seminal case, and subsequent developments are reviewed in Judge Adams' opinion in *Kahan v. Rosenstiel*, No. 18,120 (3 Cir., filed Feb. 20, 1970). Both that case and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), on which it relies, indicate that the equitable rule against saddling the active representative of a class with the entire expenses of legal efforts of benefit to all, should not be applied in a narrow technical manner. *Powell v. Pennsylvania Railroad Co.*, 267 F.2d 241 (3 Cir. 1959) is directly in point, unless we accept the district court's finding that there was insufficient evidence of a relationship between the fund and the committee activities. We have rejected that finding. We hold that committee activities forced the Fund trustees to commence the delinquency lawsuits, that these lawsuits produced the fund and that the com-

mittee's counsel fees and expenses incurred in bringing about the delinquency lawsuits are properly payable out of the Fund." (p. 41-42)

The Trustees filed a petition for rehearing, asserting *inter alia* that they had been denied their constitutional right to a hearing. Thereafter, the Court of Appeals denied the petition but filed an opinion and amended judgment withdrawing its factual findings and remanding the case for a hearing by the District Court.

Since 1965, the intervenors have asserted in this suit and in others that two of the Trustees were officers of the United Mine Workers of America, that the Fund has been dominated by the Union, and that, therefore, the Fund has been accepting payments from employers in violation of a criminal statute. In the Court below, the Trustees asserted that the intervenors could not recover counsel fees from a Fund which they allege is illegal and from a recovery which, according to them, is being illegally obtained. The Court of Appeals did not pass upon this issue.

REASONS FOR GRANTING THE WRIT

I. In Holding that the Intervenors May be Awarded Counsel Fees from the Recovery by the Fund herein when They Are at the Same Time Asserting that the Fund is Illegal, the Court below Has Made an Unprecedented Decision Contrary to Federal Labor Policy and the Interests of Beneficiaries of Welfare Funds Established by the Collective Bargaining Process.

Since 1965, the intervenors have asserted in this suit and in others that this "Fund has been dominated by the Union, that the Fund has been subject to direction by the Union," (A. 90a-91a) and that the Fund has been "accepting payments from operators in violation of a criminal statute."[2] This is the same position which the employers have taken in at least sixteen of the Trustees' suits. Nevertheless, the Court below, without considering the significance of the intervenors' assertion, has held that they are entitled to an award of counsel fees from the Fund.

Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. §186, prohibits any payment made by an employer to an employee representative, including a trustee administering a pension trust fund, unless such fund complies in all respects with the Act, *Moglia v. Geoghegan*, 403 F.2d 110, 115-116 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969). The very purpose for which the statute was enacted was the prevention of union control of welfare funds, *Arroyo v. United States*, 359 U.S. 419, 424-427 (1959); *Lewis v. Seanor Coal Co.*, 382 F.2d 437, 441-

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[2] Intervenors' Brief to the Court of Appeals, p. 17, where they also say: "when the Anthracite Wage Agreement of September, 1964 had been signed, the Trustees and the Union persisted in the most obvious violation of Section 302, the fact that two of the three Trustees were Union representatives in violation of the requirement of Section 302(c)(5)(B) that employees and employers be equally represented in the administration of the Fund. . . ."

442 (3d Cir. 1967), *cert. denied*, 390 U.S. 947 (1968). And if a welfare fund does not comply with Section 302, the payment and receipt of contributions to the fund is a violation of the Act, and the intended beneficiaries of the illegal contributions (the employees) have no legal right to the benefits of the trust. *Moglia v. Geoghegan*, *supra*, 403 F.2d at 115-116.

Section 302(e) provides the sole civil remedy to correct violations of the Act and to ensure continuing compliance with it. *Arroyo v. United States*, *supra*, 359 U.S. at 426-427. A party who alleges that a welfare fund is illegal has no right to ignore the exclusive remedy provided by the Act and elect instead to join the fund in the illegal collection of employer contributions so that he may obtain counsel fees from the recovery.

If this assertion of the intervenors (which they are continuing to press in their suit against the Union and the Trustees[3]) is sustained, employers making payments to the Fund and the Trustees receiving them will have committed a crime, and the monies held by the Fund will not be distributable to the beneficiaries, the very people the intervenors claim they represent. Thus, while alleging that they have rendered a compensable service for the benefit of the Fund, the intervenors have joined the employers in an attempt to emasculate it. Surely no equitable doctrine can require the invasion of the Fund for the payment of the intervenors' counsel fees in this situation.

This issue was presented to the Court below in the Trustees' brief, at argument and in the petition for rehearing but the Court failed to pass upon it. The effect of its omission is a holding that a party can recover counsel fees

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[3] Paragraph 24(e) of the amended complaint in that case alleges that ". . . [D]efendant United Mine Workers has controlled and dominated the Fund since the Fund's inception by reason of the fact that two of the three Fund Trustees have been officers of said defendant, one of whom until 1962 was the President of said defendant, and another of whom was until 1967 the President of a District of said defendant. . . ."

for causing and participating in what he asserts is a crime, a principle for which there is no precedent in our jurisprudence. That principle is both inherently unsound and contrary to this Court's decision in *Arroyo v. United States*, *supra*. In that case, this Court described the history of Section 302, and the intent and purpose of Congress in enacting it, and held that subsection (e) thereof provides the exclusive civil remedy to ensure continuing compliance by a welfare fund with the Act:

> "An examination of the legislative history confirms that a literal construction of this statute does no violence to common sense. When Congress enacted §302 its purpose was not to assist the States in punishing criminal conduct traditionally within their jurisdiction, but to deal with problems peculiar to collective bargaining. The provision was enacted as part of a comprehensive revision of federal labor policy in the light of experience acquired during the years following passage of the Wagner Act, and was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process.
>
> "Throughout the debates in the Seventy-ninth and Eightieth Congresses there was not the slightest indication that §302 was intended to duplicate state criminal laws. Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focussed particularly upon the latter problem because of the demands which had then recently been made by a large international union for the establishment of a welfare fund to be financed by employers' contributions and administered exclusively by union officials. . . .

> "Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. . . . To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established. . . . Continuing compliance with these standards in the administration of welfare funds was made explicitly enforceable in federal district courts by civil proceedings under §302(e). The legislative history is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy provided in that subsection." 359 U.S. at 424-427 (footnotes omitted)

This Court has also held that such welfare funds may be used only for the sole and exclusive benefit of employees, their families and dependents, *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 464 *et seq.* (1960).

This petition presents a significant question of federal labor policy because it affects vast sums of money held in trust for the benefit of innumerable employees and pensioners. Petitioners submit that this Court should decide whether a party to an action involving a welfare fund (be he an employer, union, employee or beneficiary), who asserts that the fund does not conform to Section 302, can ignore the civil remedy provided therein and seek other civil relief, joining in the alleged irregularity if he deems it to his individual benefit to do so, be awarded counsel fees from the fund or other relief, and thereby defeat federal labor policy, if his allegations are true, by permitting the fund to continue to function indefinitely in violation of the Act.

Is there no duty on such a party to use the remedy provided in Section 302(e) to force the fund into compliance? Is there no obligation on the part of the Court before which such charges are made to insist that the remedy provided by Congress be used and to hold that other relief may not be granted if it has not been used? If the answers are in the negative, petitioners respectfully submit that the purpose of Section 302 can be nullified at the option of a litigant.

II. In Holding that a Beneficiary of a Welfare Fund Created pursuant to 29 U.S.C. §186 who Allegedly Induced the Trustees to Sue an Employer and thereby "Helped to Create a Fund" Is Entitled to Counsel Fees from the Recovery, the Court below Has Made an Unprecedented Decision Contrary to Federal Labor Policy and the Interests of Beneficiaries of Such Funds.

It is a well-recognized rule of American law that ordinarily each party to a law suit must pay his own counsel fees. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-718 (1967); *Hempstead v. Meadville Theological School*, 286 Pa. 493, 495 (1926). Allowances of counsel fees "are appropriate only in exceptional cases and for dominating reasons of justice," *Sprague v. Ticonic Bank*, 307 U.S. 161, 167 (1939), and are made only "when overriding considerations of justice . . . compel such a result," *Fleischmann Distilling Corp. v. Maier Brewing Co.*, *supra*, 386 U.S. at 718.

The exception to this rule which has been invoked by the Court of Appeals is the "creation of a fund" doctrine—*i.e.*, when many persons have a common interest in a trust property or fund and one of them, for the benefit of all, at his own expense successfully brings suit for its preservation and administration the court of equity in which the suit is brought may order plaintiff to be reimbursed for his costs,

including counsel fees, from the fund so created or preserved, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970); *Trustees v. Greenough*, 105 U.S. 527, 532-533 (1881); *Sprague v. Ticonic Bank*, *supra*; *Hempstead v. Meadville Theological School*, *supra*, 286 Pa. at 497.

It is apparent from the above authorities that the rule relied upon by the Court below applies where the party seeking counsel fees has commenced and prosecuted a suit and thereby created a fund which would not have come into being but for him.

None of the authorities cited by the Court below supports a conclusion that the creation of a fund rule obtains where the recovery from which the fees are sought is the result of an action commenced by someone other than the applicant for fees and the beneficiaries of the fund have been represented throughout the suit by the party who began it. All of them involved an award of fees to a plaintiff who created a fund by commencing a law suit. As Judge McLaughlin pointed out in his dissent (p. 47), none of the cases awarded counsel fees to one who "helped to create a fund" as respondents allegedly did. None awarded fees to a party who intervened in another party's action or to a beneficiary who induced a trustee to sue. There is no authority for an award in such situations. Moreover, the reasoning underlying the rule prohibits its application to such a case.

Typical situations in which the creation of a fund doctrine justifies an award of counsel fees are a suit against a trustee for breach of his fiduciary duties;[4] a suit by a beneficiary of a trust against a debtor thereof where the trustee improperly fails to sue;[5] and a derivative suit by a shareholder against one liable to the corporation where

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[4] *E.g.*, *Trustees v. Greenough*, *supra*.

[5] See discussion in *Peoples-Pittsburgh Trust Co. v. Pittsburgh United Corp.*, 334 Pa. 107, 118 (1939). A beneficiary of a trust may sue a debtor of the trust only if the trustee fails or refuses to do so and this failure or refusal is wrongful. See *infra*.

the corporation fails to sue.[6] In such cases, if the suit results in a recovery, plaintiff is entitled to an allowance of his legal fees therefrom because he had done the job which the trustee or the corporation ought to have done, *Trustees v. Greenough*, *supra*, 105 U.S. at 532; it would be unfair to require him to bear the expense of the recovery himself, particularly since others are benefited by it, *ibid.*; and the legal fees of the trustee or corporation would have been payable had either sued and, thus, an award of fees will not improperly deplete the fund, *Decatur Mineral & Land Co. v. Palm*, 113 Ala. 531, 21 So. 315, 316 (1896).

The present case does not fall into any of the above categories, and the reasons justifying an award of counsel fees in those situations do not apply here.

This is not a suit by beneficiaries of a trust against the trustees to hold them liable for an alleged breach of their fiduciary duties. The Trustees are not defendants herein. They are named as defendants in the amended complaint filed by the Nedd group in Civil Action No. 8796, *supra*, which alleges that the Trustees have violated their fiduciary duties by failing to make reasonable efforts to collect delinquencies until compelled to do so by the Nedd group. As the District Court has held, whether the Trustees have breached any of their duties by failing to institute suits against employers sooner than they did or by any other act or omission, and whether by reason thereof they are liable in any amount, are questions to be resolved in that case. Similarly, petitioners submit, whether the intervenors would be entitled to an award of counsel fees from any recovery resulting from a judicial determination that the Trustees have violated their duties is a question for decision in that case if such a determination should be made therein.

The intervenors were not obliged to sue Honeybrook Mines because the Trustees did not refuse or fail to collect the debt owed by defendant. The Trustees commenced this

[6] See discussion and citations in *Evans v. Diamond Alkali Co.*, 315 Pa. 335, 337-338 (1934).

case. Accordingly, the intervening beneficiaries have not done the job of the Trustees.

The intervenors do not allege that the Trustees have been negligent in their prosecution of the case, and the District Court has found that the Trustees have pursued the action "diligently and forcefully." (p. 29) The intervenors do not allege that the case would have terminated unfavorably to the trust but for their intervention, that they tendered any issues in the case which were not raised by the Trustees, or that they made any argument or took any action herein which resulted in a larger recovery than would otherwise have been obtained.

The intervenors do suggest that both the Trustees and the intervenors should be awarded their counsel fees (A. 71a). This procedure would require the trust to pay twice with respect to the same recovery, an obviously inequitable result and one that is contrary to the interests of the beneficiaries of the Fund. See *Evans v. Diamond Alkali Co.*, 315 Pa. 335, 341 (1934).[7]

The trustee has the right to sue on behalf of the trust.[8] Where a trustee improperly refuses to bring an action to collect a debt owing to the trust, a beneficiary may sue the third party.[9] But where the trustee does sue, the beneficiary cannot proceed against the third party, *Restatement (2d), Trusts*, §282, Comment *a*.

The intervenors asked leave to intervene "in order to join in prosecuting plaintiffs' cause of action stated in

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[7] By agreement with their clients subject to the approval of the District Court, counsel for intervenors seek legal fees in the maximum amount of one-third of the recoveries in the Trustees' cases against the employers. In addition, the Fund would be required to pay its own counsel and the other expenses of the suits.

[8] 4 *Scott on Trusts (3d Ed.)*, §281, pp. 2334-2335.

[9] See 4 *Scott on Trusts (3d Ed.)*, §282.1. However, a trustee is not obliged to sue on every claim. If it is prudent to refrain from suit, the trustee does not violate his duty in so refraining and the beneficiaries cannot compel him to sue nor can they themselves sue the third person, *Restatement (2d), Trusts*, §177, Comment *c*; 4 *Scott on Trusts (3d Ed.)* §282.1, pp. 2338-2339, 2340.

plaintiffs' complaint" and they alleged that their presence was necessary because the Trustees' representation of their interests was inadequate (A. 15a). Thus, the intervenors did not ask to intervene for the purpose of asserting a claim of their own against either defendant or the Trustees. They came in to protect their own interests with respect to the claim of the trust which the Trustees had asserted against defendant.[10] And in protecting their own interests, the intervenors have not rendered a necessary service to the trust and therefore cannot be compensated from it. *Edison Light & Power Co. v. Penna. P.U.C.*, 34 F. Supp. 939, 942-943 (E.D. Pa. 1940), affirmed *per curiam* 119 F.2d 779 (3d Cir. 1941); *Peoples-Pittsburgh Trust Co. v. Pittsburgh United Corp.*, 334 Pa. 107 (1939); and *Smaltz Trust Estate*, 142 Pa. Super. 463 (1940).

In the *Edison Light & Power* case, *supra*, Judge Kirkpatrick held squarely that the creation of a fund rule is not applicable to intervenors in a case where all the "beneficiaries" have been actively and adequately represented throughout the action by an original party to the case who (like a trustee) had the legal responsibility to protect the beneficiaries' interest. In that case, a group of consumers intervened in an action brought by a power company against the Public Utility Commission to challenge the validity of an order requiring a rate reduction. In denying the consumers' application for counsel fees, the Court pointed out that the Commission had represented the consumers' interest in the litigation and said:

> "The theory of the petition is, of course, that the attorneys have created or protected a common fund for the benefit of all the consumers and that, under the rule of *Trustees of Internal Improvement Fund v. Greenough*, 105 U.S. 527, 26 L. Ed. 1157; *Hempstead v. Meadville Theological School*, 286 Pa. 493, 134 A. 103,

[10] See *Ex parte Gray*, 157 Ala. 358, 47 So. 286, 288-289 (1908); *Matter of Att'y Gen'l v. N. Amer. L. Ins. Co.*, 91 N. Y. 57, 60 (1883).

49 A.L.R. 1145, they are entitled to charge counsel fees against the fund.

"The prayer of the petition must be denied. No statement of the rule on which the petitioners rely has ever been extended to a case in which all the other beneficiaries of the fund have been at every stage of the proceeding which resulted in the creation of the fund actively and adequately represented, and the equitable considerations upon which the rule is based forbid its application in such cases." 34 F. Supp. at 942.

The Court of Appeals for the Third Circuit affirmed "upon the opinion of Judge Kirkpatrick," 119 F.2d at 779.

The Trustees asserted to the Court below that its prior decision in the *Edison Light and Power* case was controlling but the Court of Appeals did not mention the case in its opinion. The Court below cited as "directly in point" (p. 42) its subsequent decision in *Powell v. Penna. Railroad Co.*, 267 F.2d 241 (3d Cir. 1959), a case in which a fee was awarded to employees who commenced an action against the employer and their union, which resulted in a recovery when the employer settled the case. As the District Court pointed out in the present case (p. 31), in *Powell* counsel for the employees "prepared the lawsuit, filed it, sustained the costs, negotiated a settlement far in excess of the amount originally offered . . . and, in essence, created the fund." That situation is clearly different from the present one, in which respondents merely intervened in an action brought by the Trustees more than a year earlier. This decisive distinction also was made by Judge Kirkpatrick (who wrote the District Court's opinions in both *Edison* and *Powell*) in his opinion in the *Powell* case, 166 F. Supp. at 452-453. Moreover, the Court of Appeals itself acknowledged that the *Powell* case could not be applicable but for the factual finding that the intervenors' activities caused the Trustees to commence their suits (p. 42), a finding which the Court thereafter withdrew.

The creation of a fund doctrine is supposed to be an extraordinary exception to the well-established American rule that counsel fees are not recoverable. The exception is applicable where one brings a suit which results in a recovery. The Court below cites no precedent for its extension of the doctrine to one who allegedly has "helped to create a fund" (p. 41) by allegedly inducing the primary owner of a right to sue upon it and then intervening in the action. The decision below is inequitable because it would tax the Fund with the counsel fees of two sets of lawyers. Its analysis of the legal problem involved consists merely of the statement that the creation of a fund rule "should not be applied in a narrow technical manner" (p. 42). And the opinion of the Court below has been rendered without consideration of the fact that the party seeking a fee from the Fund is at the same time attempting to establish that the Fund is illegal.

Section 302(c) of the Labor Management Relations Act of 1947 was enacted to protect the interests of the beneficiaries of welfare funds. It requires that such funds shall be used solely and exclusively for their benefit, *Lewis v. Benedict Coal Corp., supra*, 361 U.S. at 464 *et seq.* It is not consistent with federal labor policy as expressed in this statute to permit such a fund to be charged with two sets of legal fees for making the same recovery from an employer. Welfare funds should be administered for the advantage of their beneficiaries and not for the advantage of lawyers representing groups of them who choose to intervene in actions commenced and prosecuted by the trustees of the fund.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgments and opinions of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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UNITED STATES CODE, TITLE 29:

§186. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or

accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established

by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be

used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits. June 23, 1947, c. 120, Title III, §302, 61 Stat. 157; Sept. 14, 1959, Pub.L. 86—257, Title V, §505, 73 Stat. 537.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Before the Court is a motion by intervenors, Members of the Pensioned Anthracite Coal Miners Protest Committee, for allowance of counsel fees from monies paid and payable by settlement to the Anthracite Health and Welfare Fund of the United Mine Workers of America in various suits brought by the Trustees of the Fund against delinquent coal companies. The Trustees oppose the motion.

The issue is to whether the intervenors were responsible for the creation of the Fund recoveries. If they were, counsel fees are properly awardable. Otherwise, intervenors' motion must be denied. The chronology of events as gleaned from the pleadings and affidavits filed is as follows:

The Anthracite Health and Welfare Fund was first included in the Anthracite Wage Agreement of June 7, 1946, and provided for payment of a royalty to certain designated Trustees on each ton of anthracite produced for use and sale. The amount of royalty payable was increased in later Agreements and the rate payable since 1959 is 70c per ton. In November, 1961, the pension payments from the Fund to retired miners were reduced from $50.00 per month to $30.00 per month, and subsequent to this a group known as The Pensioned Anthracite Coal Miners Protest Executive Committee was founded and Charles Nedd was designated as Chairman. In August, 1962, this Committee engaged James S. Palermo and William Bruno as legal counsel to inquire into the nature and extent of alleged delinquencies in employer payments to the Welfare Fund. Pursuant to this, counsel corresponded with the Trustees of the Fund and certain officials of the United Mine Workers of America, but were dissatisfied with the responses and, accordingly, instituted a lawsuit against the Union in the United States District Court for the Eastern District

of Pennsylvania on March 11, 1963, charging the Union with failing to collect all the royalty payments due under the contract. In the early part of 1962, counsel for the Trustees informed them of his concern that the Welfare Fund provisions contained in the Labor Contract might not be held by the Courts to comply with Section 302(c)(5) of the Labor Management Relations Act of 1947, and recommended that prior to the institution[1] of legal action against delinquent operators, an effort should be made to amend the Labor Contract to remove the possibility of an adverse ruling by the Courts. Between August, 1962, and March 6, 1963, agreements for the payment of delinquent royalties were negotiated by the Trustees with twenty-three anthracite operators and approximately $4,279,-146.81 in delinquencies have been collected as a result of these agreements. On December 11, 1963, the District Court in the Eastern District of Pennsylvania dismissed plaintiffs' action as lacking in diversity and, on appeal, this ruling was affirmed by the Circuit Court of Appeals on May 29, 1964. In the meantime, on March 18, 1964, the first of some thirty-five lawsuits against delinquent operators was filed in this Court against Honeybrook Mines, Inc. According to the affidavit of Emmett Thomas, Chairman of the Trustees of the Anthracite Health and Welfare Fund, this lawsuit was filed only after the Trustees received assurances from representatives of the United Mine Workers Union in the Spring of 1964, that an effort would be made during pending negotiations with the operators to amend the welfare provisions of the Labor Contract in accordance with the Trustees' suggestions. On January 21, 1965, certain representatives of the Pensioned Miners Protest Committee instituted a class action in this Court against the United Mine Workers of America, joining the Trustees as involuntary plaintiffs. Subsequently, on De-

[1] This very point was later raised by certain delinquent operators in the lawsuits of the Trustees to collect delinquent royalty payments. See Thomas v. Reading Anthracite Company, 264 F. Supp. 339 (M.D. Pa. 1966).

cember 21, 1965, the same representatives were allowed to intervene as plaintiffs in the pending actions of the Trustees against the delinquent operators. Since the first lawsuit was instituted on March 18, 1964, settlements totaling over $818,000.00 in cash and short-term obligations, plus judgments in excess of $1,900,000.00, have been realized.

At this point, we must remember that there are two different types of suits involved in this controversy among the pensioned miners, the Trustees, the Mine Workers Union, and the anthracite operators.[2] In the one, the pensioned miners have charged the Union and the Trustees with violations of their fiduciary duties. This case is not before us in this proceeding. In the other, the Trustees brought suit against the anthracite operators for the collection of delinquent royalty payments and, after suit was commenced, the pensioned miners group was allowed to intervene. It is this latter category of cases that is pertinent here, especially those that have been the subject of Court-approved settlements. It is from these settlements that intervenors seek payments of their counsel fees.

Ordinarily, counsel fees are not recoverable in the absence of a statute or enforceable contract providing therefor. Limited exceptions have been recognized when overriding considerations of justice compel such a result. One such exception is a case where a plaintiff traced or created a common fund for the benefit of others, as well as himself. In that situation, to have allowed the others to obtain full benefit from the plaintiff's efforts without requiring contribution or charging the common fund for attorney's fees would have been to enrich the others unjustly at the expense of the plaintiff. Fleischmann Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). Nevertheless, such allowances are appropriate only in exceptional cases and for dominating reasons of justice. Sprague v. Ticonic

[2] It is the Trustees' position that although the intervenors claim that they represent all the beneficiaries of the Fund, they do not represent, or purport to represent, working miners and certain other classes of beneficiaries.

National Bank, 307 U.S. 161 (1939). In Sprague (supra), the plaintiff had prosecuted the litigation solely at her own expense and was successful in impressing a lien upon the proceeds of certain bonds for a trust fund in which she had an interest. Her success in this case established as a matter of law the right to recovery in fourteen other trust situations similar to her own. The Court held that the general equity power "to do equity in a particular situation" supported an award of attorney's fees against all the trusts for the same reasons that underlay the common-fund decisions. Accordingly, intervenors ask this Court to ". . . award reasonable attorneys' fees to counsel out of a fund which has been created by such counsel."

The Court must concern itself with the events and circumstances leading up to the commencement of the numerous actions against the delinquent operators, for there is no evidence or argument made that once the suits were instituted, they were not pursued diligently and forcefully by plaintiffs. Indeed, the Court has participated in the avalanche of motions, discovery procedures, pretrial conferences, trials and settlements and has observed no indication of delay or dereliction in plaintiffs' prosecution of these cases. However, intervenors contend that it was the filing of their two suits against the Union and ". . . the efforts, persistence and ability of Intervenors' counsel . . . which brought about the institution of the actions against the delinquents and thus the creation of the subject fund." Plaintiffs challenge this contention and assert that the timing of their actions was based solely upon their own judgment and the advice of their counsel in the early part of 1962 that, prior to the institution of legal actions against delinquent operators, an effort should be made to amend the Labor Contract to remove the possibility of an adverse ruling by the Court that the welfare provisions did not comply with Section 302(c)(5) of the Labor Management Relations Act of 1947. According to plaintiffs, they accepted their counsel's recommendation

and devoted their efforts to collecting delinquencies by negotiations with the delinquent operators and it was not until the Spring of 1964, when they were assured by the Union that an effort would be made during the pending negotiations to amend the welfare provisions of the Agreement, that the first action against Honeybrook Mines, Inc. was instituted.

Applying the test that such allowances are appropriate only in exceptional cases where a plaintiff has created a common fund for the benefit of others, as well as himself, and where it would be unjust to allow others to obtain full benefit of plaintiff's efforts without charging the common fund for attorney's fees, I conclude that intervenors' motion must be denied. The so-called fund realized herein was the result of the efforts of Trustees and their counsel who filed, pursued and, at least in the cases where funds were produced, successfully recovered the damages sought. If there was negligence or breach of a fiduciary duty in not bringing some lawsuits sooner and as a result certain losses to the fund occurred, then this will have to be determined in the case brought against the Mine Workers Union and the Trustees. It may well be that the lawsuits against the delinquent operators would not have been started had not the pensioned miners group brought their actions against the United Mine Workers in the Eastern District and Middle District Federal Courts, but it would be pure guesswork for me to so conclude on the basis of the evidence before me. Even if I were to so conclude, however, this would still fall far short of the findings necessary to support a conclusion that the amounts recovered by the Trustees were created by the efforts of intervenors' counsel. Their efforts may have been meaningful and commendable, but they did not rise to the level, in the suits before me, to justify an award of counsel fees to them out of the amounts recovered by the Trustees. None of the cases cited by intervenors dictate such a result. In Powell v. Pennsylvania Railroad

Company, 267 F. 2d 241 (3d Cir. 1959), plaintiffs were employees of defendant railroad and were members of the Brotherhood of Railway and Steamship Clerks, et al. In January, 1949, on complaint of the Brotherhood, the National Adjustment Board found that from March, 1944, to March, 1948, the Railroad, in violation of its labor contract, permitted employees of a private labor contractor to perform services that should have been performed by railroad employees. The Board ordered the Railroad and the Brotherhood to determine which of the Railroad's employees were deprived of work and to pay them for the time lost. From January, 1949, to June, 1956, comparatively little was done to bring about an adjustment of the matter, except that the Railroad offered $5,000.00 in settlement to the Brotherhood and it was rejected. In June, 1956, a class suit was brought by certain employees against the Brotherhood and the Railroad for willful failure to effectuate the award and, after negotiations, the Railroad agreed to pay $300,000.00 into Court in settlement of the action, plus $25,000.00 to cover expenses. In that case, counsel seeking compensation from the fund paid into Court actually commenced the lawsuit, paid the costs, and, in the words of the Court ". . . brought about a reality instead of a promise and thus created a fund." Moreover, after negotiations among the parties produced the stipulation of settlement, the action against the Railroad was dismissed, with prejudice, but plaintiffs kept open their action against the Brotherhood pending payment of the determined sums to the employees entitled to share. As can be seen, counsel in that case prepared the lawsuit, filed it, sustained the costs, negotiated a settlement far in excess of the amount originally offered in settlement by the Railroad and, in essence, created the fund. None of these factors are present in the cases between the Trustees and the delinquent operators. Similarly, in Paris v. Metropolitan Life Insurance Co., 94 F. Supp. 792 (S.D. N.Y. 1947), counsel fees were sought by plaintiffs in a class

action which was commenced, financed, prosecuted and settled by plaintiffs' counsel alone. The Court specifically held that the fund was created through the efforts of counsel and that those who benefited from these efforts should share in the burden. In Cherner v. Transitron Electronic Corp., 221 F. Supp. 55 (D.C. Mass. 1963), modified and affirmed sub nom. Green v. Transitron Electronics Corp., 326 F.2d 492 (1st Cir. 1964), stockholder actions were filed charging defendant corporation with false or misleading statements in two public stock offerings which caused a sharp loss in the value of the stock. Defendant's motion for summary judgment was denied and discussions looking toward settlement were conducted in the Summer and Fall of 1962. In December, 1962, an agreement was reached and the sum of $5,300,000.00 was paid into Court in settlement of the case and the agreement specifically provided for the payment of fees and expenses of plaintiffs' counsel. Once again, the wide factual difference between this case and the one before us is obvious. In short, the amounts collected and collectible on judgments entered in this Court were the result of the Trustees' lawsuits against the operators involved. We are confronted solely with the question of whether the fees of counsel for the intervenors should be paid out of the amounts recovered in these lawsuits and we are not concerned at this time with the question of whether the Mine Workers Union and the Trustees caused losses to the Welfare Fund by failing to properly perform their fiduciary duties. This latter issue will have to await another day. I conclude that intervenors' counsel fees should not be paid from the amounts recovered by the Trustees in their suits against the delinquent operators and it will be so ordered.

Finally, intervenors seek an award of counsel fees under 29 U.S.C.A. §501(a) and (b).[3] A reading of this

[3] 29 U.S.C.A. §501(a) and (b) provide:

"(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is,

statute clearly shows that it is inapplicable to the case before us. The statute specifically applies to suits between Union members and officers, agents, shop stewards, and other representatives of a labor organization occupying positions of trust. Moreover, there must be a showing that such labor representatives violated the duties declared in subsection (a) and that the labor organization refused

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therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

"(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation."

or failed to sue within a reasonable time after being requested to do so by any member of the labor organization. Finally, no such proceeding shall be brought except upon leave of the Court obtained upon verified application and for good cause shown. All of these requirements are absent here, hence the statute is inapplicable.

/s/WILLIAM J. NEALON

United States District Judge

January 31, 1969

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Before McLAUGHLIN, FREEDMAN and GIBBONS, *Circuit Judges*

(Filed May 28, 1970)

GIBBONS, *Circuit Judge*.

The intervenors, members of the Pensioned Anthracite Coal Miners Protest Executive Committee (hereinafter the Committee), appeal from the denial of their motion to direct the payment of their counsel fees out of a fund. The fund in question represents recoveries made by the trustees of the Anthracite Health and Welfare Fund of the United Mine Workers of America (hereinafter the Fund), from certain coal operators who were delinquent in royalty payments specified in the industry collective bargaining agreements. The lawsuit against Honeybrook Mines was filed in May of 1964 and the committee's motion to intervene was granted in December of 1965. In addition to the Honeybrook Mines suit, thirty-five other lawsuits against delinquent mine operators were later filed by the Fund trustees. A fee application was made and denied in each case. Timely notices of appeal were filed in each case, but by agreement of counsel only the appeal in the instant case was docketed in this court. In all, judgments in excess of $1,900,000. have been obtained, settlements in excess of $800,000. have been accepted, and agreements have been made with many delinquent coal operators for the payment of approximately $4,280,000. The committee contends that it was largely responsible for the accomplishment of these results, and that its counsel fees should be paid from the resulting fund. The district court did not agree.

The essence of the decision appealed from may be found in this language of the district court:

> It may well be that the lawsuits against the delinquent operators would not have been started had not the pensioned miners group brought their actions against the United Mine Workers in the Eastern District and Middle District Federal Courts, but it would be pure guesswork for me to so conclude on the basis of the evidence before me. Even if I were to so conclude, however, this would still fall far short of the findings necessary to support a conclusion that the amounts recovered by the Trustees were created by the efforts of intervenors counsel. Their efforts may have been meaningful and commendable, but they did not rise to the level, in the suits before me, to justify an award of counsel fees to them out of the amounts recovered by the Trustees. (101a-102a)

That court thus made (1) a finding of fact that there was no evidence that the lawsuits against the delinquent mine operators were the result of the litigation and other activities pursued by appellants, and (2) a conclusion of law that even if the lawsuits against the delinquent mine operators would not have resulted but for appellants' activities, the expenses of those activities are not recoverable from the resulting fund. The finding of fact is clearly erroneous, and the conclusion of law is wrong.

The Facts

The Anthracite Health and Welfare Fund came into existence under the terms of the Anthracite Wage Agreement of June 7, 1946. That agreement provided that the Fund would be managed by three trustees, two appointed by the President of the United Mine Workers of America and one appointed by the Anthracite Operators, (21a). The Fund, resulting from royalty payments by coal operators on anthracite production, was intended to provide pensions to retired miners. When, in November, 1961, the pensions,

which were originally to be $100. a month, were finally reduced to $30. a month, discontent in the coal regions led to the establishment of the Pensioned Anthracite Coal Miners Protest Executive Committee. Beginning in 1961, members of this committee met with Thomas Kennedy, who was concurrently chairman of the trustees of the Fund and International President of the United Mine Workers of America, and with Mart F. Brennan, who was concurrently a trustee of the Fund and President of District 7, United Mine Workers of America. The committee members were informed that the reductions in pension payments were necessitated by delinquencies in royalty payments.

When, in February, 1962, the committee requested the names of coal companies which were delinquent, the Fund trustees refused to disclose this information, (33a; 86a). When the committee retained counsel and counsel, in September, October and November, 1962 sought the same information, the trustees again refused, (33a; 87a). The efforts to obtain this information continued, by requests to the trustees by interrogatories in various lawsuits, and pursuant to the Welfare and Pension Plan Disclosure Act, 29 U.S.C. §301 *et seq.* (1964), (34a). A partial disclosure was made on October 11, 1965, (34a).

The refusal of the Fund trustees to disclose to representatives of the *cestuis* of the trust the names of the delinquent operators is admitted (55a) but explained thus:

> . . . ; that counsel for applicants were informed by the trustees that in the judgment of the trustees such information might have a serious effect on the credit of the companies involved and the future of the Fund if such information were made public, except by way of actions to collect the delinquencies. (Brennan affidavit, 55a).

To us this explanation has a hollow ring. But taking it at face value, in November, 1962 the committee and counsel were confronted with this situation:

(1) They knew or could learn from public records the production of each company.

(2) They knew, or could learn from public records, therefore, how much in royalties should have been collected.

(3) They were informed by the Fund trustees of extensive delinquencies.

(4) The trustees of the Fund declined to disclose to the very beneficiaries of the trust which companies were delinquent, *for fear of harm to the credit of the companies!*

Now it may be that for the overall health of the admittedly ailing anthracite industry, (62a), the trustees should have been cautious in permitting pressure to be put on the delinquent companies. But that is not the issue here. The pensioned miners were not interested in the health of the industry, but in payments from the Fund. Thus, the situation was analogous to a dispute between income beneficiaries looking for short term returns, and remaindermen looking for safety and possible capital appreciation. Here the record of decisions of the trustees showed consistent concern for the anthracite industry at the quite evident expense of current payments to the pensioners. That this policy of the Fund trustees may have been sounder in the long run (a matter of speculation), is irrelevant if in fact the activities of the committee and its counsel forced a change in the direction of the Fund which benefited the class of current income beneficiaries.

Faced, in 1961 and 1962, with the obvious reluctance of the Fund trustees to rock the boat, the committee counsel commenced their own investigation of public records of the United States Department of Labor, the Pennsylvania Department of Internal Affairs, the Pennsylvania Department of Mines and Mineral Industries, the Corporation Bureau of the Pennsylvania Department of State, and the court-

house records of the anthracite producing counties, (87a). A comparison of the production records in the Pennsylvania Department of Mines and Mineral Industries with the Fund reports filed with the United States Department of Labor disclosed that millions of dollars in royalties remained unpaid, (88a). The collection activities by the Fund trustees disclosed in the court records (outlined in the affidavit of Charles Nedd, 25a-33a) fell far short of convincing the committee that the delinquent operators were being pursued with the diligence which might restore the pension cuts.

In March, 1963, the committee commenced a class action against the United Mine Workers of America to collect for the Fund beneficiaries the amount of the delinquent payments, on the ground that the Union had failed to enforce the royalty payment provisions of the agreements. Although this suit was dismissed on jurisdictional grounds, *Nedd v. United Mine Workers of America*, 225 F. Supp. 750 (E.D. Pa. 1963), *aff'd.*, 332 F.2d 373 (3 Cir. 1964), it cannot be ignored for purposes of the present application, if, as we believe, the record discloses that it was instrumental in prodding the cautious trustees into more aggressive action. It was on May 18, 1964, three days before the argument in this court on the appeal from dismissal of the committee's first lawsuit, and fourteen months after that suit had been filed, that the Fund trustees finally filed the complaint against Honeybrook Mines which resulted in recoveries here in issue. A suit against a second operator (Northwest Mining Company) was filed on December 9, 1964.

On January 21, 1965 the committee filed a new lawsuit against the United Mine Workers of America, Civil Action No. 8796, in the district court for the Middle District of Pennsylvania. Jurisdiction was based on Section 301 of the Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. §185(a) *et seq.*, (1964), and the committee attempted to join the Fund trustees as involuntary plaintiffs. The trustees resisted being joined and the union claimed lack of

jurisdiction. This court, in *Nedd v. United Mine Workers*, 400 F.2d 103 (3 Cir. 1968) eventually held that there was probable federal jurisdiction under 28 U.S.C. §1337 (1964), and that the trustees of the Fund were necessary parties. On remand an amended complaint was filed and that case is still pending. The district court made reference to that lawsuit in its memorandum denying the committee's fee application, (103a). It ignored the undisputed fact that it was not until after the second committee lawsuit was filed that the Fund trustees finally started suit against some thirty-three additional delinquent operators, many for delinquencies of long standing, (90a).

In explanation of the delay between early 1962, when the committee first began to exert pressure on behalf of the pensioned miners, and March, 1964, when the Honeybrook Mines action was filed, or more precisely between 1962 and 1965 and 1966, when the bulk of the delinquency suits were filed, the Fund trustees assert their fear that the operators would plead in defense a violation of Section 302(c)(5) of the Labor-Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. §186(c)(5) (1964). Thus, they say, on advice of counsel they delayed suit until the amendment of the welfare fund provisions in the Anthracite Wage Agreement of September 1, 1964.

There is no explanation for the delay in pressing for a change in the welfare fund provisions between 1947, when Section 302(c)(5) was enacted (Act of June 23, 1947, Ch. 120, §302(c)(5), 61 Stat. 157), and September 1, 1964, when the anthracite wage agreement was amended. In view of the fact that the Honeybrook Mines suit was filed in May of 1964, and that a number of other suits had been filed between 1954 and 1961, (23-33a), the trustees' explanation induces a certain degree of skepticism. Moreover, it must be contrasted with trustee Brennan's admitted concern with the credit standing of the coal operators, (55a). But in any event the explanation is additional proof that, continuing until well into 1964 at least, the

Fund trustees continued to drag their feet while the committee continued to press for prompt action.

Exhibits in the record outline the history of the severe downturn of the anthracite industry over the twenty years during which the delinquencies were permitted to accumulate, and this downturn is urged by appellees as a factor that could not have been ignored by the trustees in deciding how best to approach the delinquent payment problem. True enough; and the weight which the Fund trustees could properly give to the condition of the industry, when balanced against their obligation to the present Fund beneficiaries, probably will be determined in the second committee (Middle District) lawsuit. But the issue on the fee application is not whether or not the trustees' approach to the industry was sounder than that of the committee. It is, rather, whether or not the committee, which vehemently disagreed with that approach, by its activities helped to create a fund for the class for which it acted. The district court concluded that such a finding would be "pure guesswork." We conclude that on the record before us any other finding is clearly erroneous.

The Law

The district court concludes that even if the delinquency lawsuits would not have been started had not the pensioned miners' group started their actions, the Fund still could not be charged with committee counsel fees when the trustees were the actual plaintiffs. This is a far too narrow view of the applicable rule. *Trustees v. Greenough*, 105 U.S. 527 (1881) is the seminal case, and subsequent developments are reviewed in Judge Adams' opinion in *Kahan v. Rodenstiel*, No. 18,120 (3 Cir., filed Feb. 20, 1970). Both that case and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), on which it relies, indicate that the equitable rule against saddling the active representative

of a class with the entire expenses of legal efforts of benefit to all, should not be applied in a narrow technical manner. *Powell v. Pennsylvania Railroad Co.*, 267 F.2d 241 (3 Cir. 1959) is directly in point, unless we accept the district court's finding that there was insufficient evidence of a relationship between the fund and the committee activities. We have rejected that finding. We hold that committee activities forced the Fund trustees to commence the delinquency lawsuits, that these lawsuits produced the fund and that the committee's counsel fees and expenses incurred in bringing about the delinquency lawsuits are properly payable out of the Fund.

The order of the district court denying intervenors' motion to direct the payment of its counsel fees will be reversed and the case will be remanded to the district court which should make an award of counsel fees appropriate under the circumstances of the case, taking into account not only services rendered during the course of the delinquency lawsuits, but also services rendered in bringing about the change in the Fund trustees' approach.

McLAUGHLIN, *Circuit Judge*, dissenting.

I must respectfully dissent from the conclusion reached by the majority. I do so primarily because it is self evident from the record before us that the findings made by Judge Nealon in his carefully reasoned opinion are not "clearly erroneous."

In Speyer, Inc. v. Humble Oil Refining Company, 403 F.2d 766 at 770 (3 Cir. 1968), cert. denied, 394 U.S. 1015 (1969), Judge Aldisert recently reiterated the guidelines this Circuit should follow in reviewing findings of fact.

> "In reviewing the decision of the District Court, *our responsibility is not to substitute findings we*

> *could have made had we been the fact-finding tribunal;* our sole function is to review the record to determine whether the findings of the District Court were clearly erroneous, i.e., whether we are left with a definite and firm conviction that a mistake has been committed.' Eastern Express, Inc. v. Mack Warehouse Corp., 326 F.2d 554 (3 Cir. 1964); International Industries, Inc. v. Warren Petroleum Corp., 248 F.2d 696 (3 Cir. 1959), cert. denied, 355 U.S. 943, 78 S.Ct. 529, 2 L.Ed. 2d 523 (1959); Williams v. Babcock & Wilcox Co., 262 F.2d 253 (3 Cir. 1959), cert. denied, 359 U.S. 969, 79 S.Ct. 880, 3 L.Ed. 2d 836 (1959)." (Emphasis supplied.)

As the majority notes, it is most significant that Judge Nealon found the following:

> "It may well be that the lawsuits against the delinquent operators would not have been started had not the pensioned miners group brought their actions against the United Mine Workers . . . *but it would be pure guesswork for me to so conclude on the basis of the evidence before me.* . . . Their efforts may have been meaningful and commendable, but they did not rise to the level, in the suits before me, to justify an award of counsel fees to them out of the amounts recovered by the Trustees." (101a-102a.) (Emphasis supplied.)

Despite this definitive finding by the district court that there was insufficient evidence to justify a holding that intervenors' actions were the cause of the creation of the "fund" in question, and despite Judge Nealon's emphatic ruling that it would be "pure guesswork for me to so conclude on the basis of the evidence before me," the majority nonetheless asserts that these findings are clearly erroneous. What the majority has done today amounts to a substitution of its findings for those made by the district

court. The evidence presented is sparse, and this undoubtedly creates a situation wherein this Court reviewing the facts *de novo*, if that were our function, might conclude contrariwise to the district court, but even then such conclusion would have little support in the record.

The majority opinion sets out the facts briefly tracing the history of the Anthracite Health and Welfare Fund, and the circumstances surrounding the most unfortunate and substantial reductions in the pension payments received from that Fund by the retired miners. The efforts of the Pensioned Anthracite Coal Miners Protest Executive Committee and its counsel are detailed, and the actions of the Trustees in starting various suits, settling some, recovering judgments in others, etc. are described.—It is undisputed that the proofs indicated that it was not until approximately March 1964, when the instant suit was commenced, that the Trustees vigorously began to pursue in court mine operators who were delinquent in their payments to the Fund, although several actions had been filed by the Trustees in the period 1954-1961. The majority, however, would have it that the suits filed by the Committee at approximately the same time were instrumental in bringing about recoveries to the Fund. Parallelism of actions in time is not proof that the actions of the Trustees and the Committee were interrelated; much less is it proof that the actions of the Committee caused the Trustees to act, or the "fund" to be created. Indeed, the time sequences of the actions of the Trustees and the Committee before us are *not* so coincidental as to overpower the conclusion that a cause and effect relationship was not present, and even less so, Judge Nealon's finding, which is simply that there was insufficient evidence to show that these actions had a causal connection.

The Pensioned Anthracite Coal Miners Protest Executive Committee was established and began its efforts in 1961. In March 1963, the Committee's first suit was filed, but though *the defendant (the United Mine Workers of America) was successful in having it dismissed* on juris-

dictional grounds, the majority concludes "the record discloses that it was instrumental in prodding the cautious trustees into more aggressive action." Later the majority goes on to argue that it was just prior to argument in this Court on the Committee's appeal from the dismissal of its action that the suit against Honeybrook Mines, the instant action, was filed by the Trustees. Since the Committee's suit had been dismissed, with this Court affirming the dismissal, 332 F.2d 373, I fail to see how Judge Nealon can be said to have been clearly erroneous in *not* finding that this Committee action was instrumental in creating the recoveries ultimately recouped by the Trustees. Not only was the union consistently successful in having the district court dismiss the Committee's first action and in having that dismissal affirmed on appeal, but the *Trustees* were not even parties to that first suit. It is as though the majority seeks to draw an affirmative conclusion from a non-happening; if jurisdiction had been sustained in the first suit brought by the Committee *and* if the Trustees had been party defendants, the majority's conclusion might be more plausible. The importance of the second suit filed by the Committee to the majority's theory is still more dubious because though it was filed in January 1965, *(after* the Trustees started suit) it was not until August 1968 that this Court decided that if the Committee's complaint was amended, and if the *Trustees* were joined as parties, the Committee would then have a valid cause of action. 400 F.2d 103. On January 23, 1969, the Committee did finally amend its complaint naming the Trustees as defendants. However, by that time judgment had already been entered in this case and the Committee's motion to direct payment of counsel fees had been filed on September 19, 1968, months before the Trustees were made defendants in the Committee's second suit.

The first suit brought by the Committee (which, as has been stated, the majority feels ". . . was instrumental into prodding the cautious trustees into more aggressive action") was not filed until March 11, 1963, although

Judge Nealon found that prior to the filing of the suit, "between August, 1962, and March 6, 1963, agreements for the payment of delinquent royalties were negotiated by the Trustees with twenty-three anthracite operators and approximately $4,279,146.81 in delinquencies have been collected as a result of these agreements." Actually, the majority comment that "In all, judgments in excess of $1,900,000. have been obtained, settlements in excess of $800,000. have been accepted, and agreements have been made with many delinquent coal operators for the payment of approximately $4,280,000.," [1] overlooks the true then existent situation that the agreements for the payment of the $4,280,000. were entered into prior to the filing of any suits by the Committee and that the judgments of $1,900,000., and the settlements of $800,000. were entered *prior to the naming of the Trustees as defendants by the Committee.*

In the instant cause in which the application for counsel fees before us was made, some fifteen months after this suit was commenced by the Trustees, the Committee intervened without filing any new pleading. Judge Nealon found that there was no evidence adduced or argument made by the Committee that the Trustees did not diligently prosecute this, and its companion actions. Although under Sprague v. Ticonic Bank, 307 U.S. 161 (1939), it is well settled that substance and not form is to govern whether or not counsel fees should be awarded out of a particular fund, the position of the Committee here as *intervenors*—who, the district court implicitly found, did not materially contribute to the plaintiffs' efforts—takes on added significance in view of the circumstance that an award of fees to the intervenors out of the recoveries for the Anthracite Health and Welfare Fund would tax that Fund twice for counsel fees as the fees of the Trustees' counsel are a legitimate expense of the Fund. On this phase of our problem it should be called to mind that when appellees'

[1] At 2.

counsel noted[2] that there is no recorded decision granting counsel fees to intervenors in fund theory cases it is not just an assertion of form over substance; in intervenor situations such as this appeal it is generally not the intervenors but the plaintiff whose efforts have resulted in the creation of the fund.

In addition to my firm disagreement with the majority over Judge Nealon's factual determinations, I have great difficulty as to the majority's conclusion of law. The majority states the issue before us as follows:

> ". . . the issue on the fee application is . . whether or not the committee, . . . by its activities *helped* to create a fund for the class for which it acted." (Emphasis supplied).

If the majority is of the opinion that the Committee is entitled to counsel fees simply for having "helped" to create the recoveries for the Fund, then this is a departure from existing case law and a wide expansion of the fund cases doctrine. In Powell, supra, urged on us by appellant and relied on by the majority, this Court held that recovery of fees was justified because plaintiff's efforts "created" the fund in question. 267 F.2d 241, 245. In this Circuit's recent Kahan opinion, supra, also cited by the majority, the Court stated that a necessary prerequisite for recovery of counsel fees was a determination that it was "the plaintiff's effort which *caused* others to benefit." (Emphasis supplied.) But if as strongly appears, the majority is concluding as a matter of law that the Committee's actions "produced"[3] the recoveries involved, I completely disagree. The plaintiff Trustees, and not the intervening Committee "produced" the fund before us.

Judge Nealon's opinion is sound, and I would affirm.

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[2] Appellees' brief, 12.

[3] At 11.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 31, 1969, which denied intervenors' motion to direct the payment of its counsel fees be, and the same is hereby reversed, and the cause remanded to the said District Court with direction to make an award of counsel fees appropriate under the circumstances of the case, taking into account not only services rendered during the course of the delinquency lawsuits, but also services rendered in bringing about the change in the Fund trustees' approach, in accordance with the opinion of this Court. Costs taxed in favor of appellees.

May 28, 1970

OPINION ON PETITION FOR REHEARING

Before McLAUGHLIN, FREEDMAN and GIBBONS, *Circuit Judges.*

(Filed August 5, 1970)

PER CURIAM:

Appellees have filed a petition for rehearing by the court en banc which, except in one respect, raises no questions not already considered. That one respect is appellees' contention that the propriety of award of counsel fees by the intervenors was decided by the district court and this court on affidavits without an evidentiary hearing. The panel which heard this appeal was left with the impression that both sides consented to the submission of the fee question on affidavits. Upon review of the entire record, we conclude that there was no waiver by appellees of the right to an evidentiary hearing on any disputed fact issues. The opinion of the court is, therefore, amended to provide that the order of the district court denying intervenors' motion to direct the payment of its counsel fees will be reversed and the case will be remanded to the district court for a hearing on the fee application. In that hearing the district court should decide whether or not to grant such application, and the amount thereof, in the light of the legal principles announced in the opinion of the court. The petition for rehearing will be denied.

AMENDED JUDGMENT ON PETITION FOR REHEARING

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 31, 1969, be, and the same is hereby reversed, and the cause remanded to the said District Court for a hearing on the fee application, in accordance with the opinion and judgment of this Court, filed May 28, 1970 as amended by judgment filed June 8, 1970, and as further amended by the opinion of this Court on Petition for Rehearing, filed this day. Costs taxed in favor of appellants.

J

Dated: August 5, 1970